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Physicians and Surgeons - Actions for Negligence and Malpractice - Complaints, Filed by Parents of Abnormal Infants Alleging Wrongful Life Based upon Physicians' Negligence Which Resulted in Parents' Decision Not to Terminate Pregnancy, Stated Legally Cognizable Causes of Action, However Similar Complaints, Filed on Behalf of Abnormal Infants, Did Not

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PHYSICIANS AND SURGEONS — ACTIONS FOR NEGLIGENCE AND MALPRACTICE — COMPLAINTS, FILED BY PARENTS OF ABNORMAL INFANTS ALLEGING "WRONGFUL LIFE" BASED UPON PHYSICIANS' NEGLIGENCE WHICH RESULTED IN PARENTS' DECISION NOT TO TERMINATE PREGNANCY, STATED LEGALLY COGNIZABLE CAUSES OF ACTION, HOWEVER SIMILAR COMPLAINTS, FILED ON BEHALF OF ABNORNAL INFANTS, DID NOT.

Upon learning of her pregnancy, Mrs. Becker and her husband contacted the defendant physicians.[1] The Becker's infant was subsequently born severely retarded, suffering from Down's Syndrome.[2] The plaintiffs brought suit on their own behalf, and that of their infant, alleging the defendants negligently failed to inform Mrs. Becker of the increased risk of Down's Syndrome in children born to women over thirty-five years of age and of the availability of an amniocentesis test.[3] Had the test been performed and the true condition of the fetus revealed, the plaintiffs would have terminated the pregnancy.[4] They sought damages for medical expenses for the long-term institutional care of the infant, physical and emotional injury and loss of services and consortium.[5] The

1. Becker v. Schwartz, 46 N.Y.2d 401, ____, 386 N.E.2d 807, 808, 413 N.Y.S.2d 895, 896 (1978). Defendants were specialists in obstetrics and gynecology. The plaintiff remained under their exclusive care throughout the pregnancy and the birth of her child. *Id.*

2. *Id.* Down's Syndrome, commonly known as mongolism, is a form of retardation accompanied by distortions in physical features. SCHMIDT'S ATTORNEY'S DICTIONARY OF MEDICINE M-107 (1978).

3. 46 N.Y.2d at ____, 386 N.E.2d at 808, 413 N.Y.S.2d at 897. Amniocentesis involves the perforating or tapping with a needle of the inner layer of tissue which forms the bag containing the fetus in the pregnant uterus. This procedure is used to remove and study part of the amniotic fluid. The test will determine whether a massive genetic disorder such as Down's Syndrome is present in the fetus. SCHMIDT'S ATTORNEY'S DICTIONARY OF MEDICINE A-137 (1978).

4. 46 N.Y.2d at ____, 386 N.E.2d at 810, 413 N.Y.S.2d at 898.

5. *Id.* at ____, 386 N.E.2d at 809, 413 N.Y.S.2d at 897. The original action, brought in the Supreme Court, Trial Term, Nassau County, New York, resulted in the granting of the defendants'

New York Court of Appeals *held* that a complaint filed on behalf of an abnormal infant alleging negligence against a physician for failure to inform parents of the risks involved in pregnancy, resulting in a decision not to terminate a pregnancy, did not state a legally cognizable cause of action,[6] but that a complaint, filed by parents of an abnormal infant alleging such negligence, did state a legally cognizable cause of action for pecuniary damages suffered as a consequence of birth.[7] *Becker v. Schwartz*, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978).[8]

Courts have consistently rejected "wrongful life"[9] actions filed on behalf of infants who allege that, but for the negligence of a physician, they would not have been born to suffer an impaired life.[10] In *Gleitman v. Cosgrove*,[11] the New Jersey Supreme Court affirmed the dismissal of an action brought on behalf of an infant who had been born severely retarded as a result of the mother's contraction of rubella during the first trimester of pregnancy.[12] The defendant advised the mother that the rubella would have no effect on the fetus.[13] Plaintiff brought suit on the theory that had the defendant doctor advised his parents of the possibility of

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motion to dismiss the complaint. The Supreme Court, Appellate Division, modified the order which granted the dismissal by ruling that the complaint, insofar as it alleged negligence on the part of the physician in failing to give the plaintiffs sufficient information to decide whether or not to continue the pregnancy, did state a cause of action in malpractice for pecuniary loss. The court affirmed the dismissal of the plaintiffs' cause of action seeking damages for emotional distress. Becker v. Schwartz, 60 App. Div. 587, ____, 400 N.Y.S.2d 119, 119-20 (1977).

6. 46 N.Y.2d at ____, 386 N.E.2d at 811, 413 N.Y.S.2d at 899-900. A legally cognizable action is one "within the jurisdiction of the court or the power given to the court by law to adjudicate the controversy." Samuel Goldwyn Inc. v. United Artists Corp., 113 F.2d 703, 707 (4th Cir. 1940).

7. 46 N.Y.2d at ____, 386 N.E.2d at 813, 413 N.Y.S.2d at 901. The court specifically rejected the allowance of damages for psychic or emotional harm to the parents occasioned by the birth of their child. *Id.* at ____, 386 N.E.2d at 813, 413 N.Y.S.2d at 902.

8. Park v. Chessin, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978), is a companion case to *Becker* involving the birth of an infant with polycystic kidney disease to parents who had previously had a similarly afflicted child. Prior to the birth of the second diseased child, they had consulted with the defendant obstetricians who incorrectly informed the plaintiffs that the disease was not hereditary. Plaintiffs alleged that, but for the defendants' negligence, they would not have conceived a second child. The result in *Park* was identical to that in *Becker*. *Id.*

9. Many alleged wrongs have been grouped under a cause of action termed "wrongful life" and some confusion exists as to what actions should be included under that term. True "wrongful life" actions are those in which the action is based upon the birth of an intended, but abnormal child, which the plaintiff contends would not have been born at all had the parents been properly advised of the abnormality. In this type of action it is not alleged that the defendant's treatment caused the abnormalities. 46 N.Y.2d at ____, 386 N.E.2d at 811, 413 N.Y.S.2d at 899.

Actions for "wrongful life" should be distinguished primarily from actions for "wrongful conception," where an unplanned but healthy child is born after a negligently performed and unsuccessful sterilization procedure. *Id.*

For an alternative classification scheme for these actions, *see* Kashi, *The Case of the Unwanted Blessing: Wrongful Life*, 31 U. MIAMI L. REV. 1409, 1409-10 (1977).

10. Berman v. Allen, 80 N.J. 421, 404 A.2d 8 (1979); Gleitman v. Cosgrove, 49 N.J. 22, 227 A.2d 689 (1967); Stewart v. Long Island College Hosp., 30 N.Y.2d 695, 283 N.E.2d 616, 332 N.Y.S.2d 640 (1972); Jacobs v. Theimer, 519 S.W.2d 846 (Tex. 1975); Dumer v. St. Michael's Hosp., 69 Wis.2d 766, 233 N.W.2d 372 (1975).

11. 49 N.J. 22, 227 A.2d 689 (1967).

12. Gleitman v. Cosgrove, 49 N.J. 22, ____, 227 A.2d 689, 692 (1967).

13. *Id.* at ____, 227 A.2d at 690.

abnormalities, the pregnancy would have been terminated.[14] Plaintiff alleged that since he would not have been born, his very life was wrongful.[15] The court affirmed the dismissal ruling that "the conduct complained of, even if true, does not give rise to damages cognizable at law."[16] Other courts[17] have also rejected "wrongful life" claims brought by infants on this basis.

Smith v. United States,[18] rejected a claim similar to that in *Gleitman* on a different theory. This action was brought on behalf of an infant born with serious defects as a result of the mother's contraction of rubella during the first trimester of pregnancy.[19] Plaintiff alleged that the physician had negligently failed to diagnose the rubella and thereby deprived the parents of the opportunity to terminate the pregnancy.[20] The court found that because there was no effective treatment to reduce the risk of abnormalities in an infant after an incidence of rubella in the mother, the diagnosis, whether incorrect or not, was not the proximate cause of the infant plaintiff's injuries.[21]

Actions for "wrongful life" brought by parents on their own behalf were rejected by the courts until recently.[22] A growing majority of courts that have considered the question have recognized an action by parents for "wrongful life" as legally cognizable.[23] This has been particularly true since *Roe v. Wade*,[24] which removed state barriers from most abortions. The critical issue for these courts has been the nature of allowable damages. Texas was the first to recognize, as legally cognizable, an action by

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14. *Id.* at ____, 227 A.2d at 691.
15. *Id.* at ____, 227 A.2d at 692.
16. *Id.* The *Gleitman* court stated as follows:

> The infant would have us measure the difference between his life with defects against the utter void of non-existence, but it is impossible to make such a determination. This court cannot weigh the value of a life with impairments against the non-existence of life itself. By asserting that he should not have been born, the infant plaintiff makes it logically impossible for a court to measure his alleged damages because of the impossibility of making the comparison required by compensatory remedies.

Id.

17. Gildiner v. Thomas Jefferson Univ. Hosp., 451 F. Supp. 692 (E.D. Pa. 1978); Dumer v. St. Michael's Hosp., 69 Wis.2d 766, 233 N.W.2d 372 (1975).
18. 392 F. Supp. 654 (N.D. Ohio 1975).
19. Smith v. United States, 392 F. Supp. 654, 655 (N.D. Ohio 1975).
20. *Id.*
21. *Id.*
22. Gleitman v. Cosgrove, 49 N.J. 22, 227 A.2d 689 (1967); Stewart v. Long Island College Hosp., 30 N.Y.2d 695, 283 N.E.2d 616, 332 N.Y.S.2d 640 (1972).
23. Gildiner v. Thomas Jefferson Univ. Hosp., 451 F. Supp. 692 (E.D. Pa. 1978); Berman v. Allen, 80 N.J. 421, 404 A.2d 8 (1979); Jacobs v. Theimer, 519 S.W.2d 846 (Tex. 1975); Dumer v. St. Michael's Hosp., 69 Wis.2d 766, 233 N.W.2d 372 (1975).
24. 410 U.S. 113 (1973). *Roe* and its companion case, Doe v. Bolton, 410 U.S. 179 (1973), struck down two statutes which restricted a pregnant woman's right to an abortion. The Court held that a state could not constitutionally limit a pregnant woman's right to an abortion during the first trimester of pregnancy. 410 U.S. at 163; 410 U.S. at 194, 198, 199.

parents against a physician for "wrongful life" in *Jacobs v. Theimer*.[25] The case involved an action by parents against a physician for negligently failing to diagnose rubella in the mother during the first trimester of pregnancy.[26] Plaintiffs alleged that defendant's negligence deprived them of the option to terminate the pregnancy.[27] The court recognized the cause of action as a cognizable one in the area of medical malpractice and stated that defendant was under a duty to disclose the risk of a defective infant.[28] As a matter of policy the court found that such reasonable disclosures, regarding the nature and hazards of any disease, would have been made by a medical practitioner exercising due care.[29] Allowable damages, if proven, would be limited to the financial expenses reasonably necessary for the care and treatment of the child's abnormality.[30] The *Jacobs* court disallowed damages for additional child rearing expenses as based on speculation of the emotional benefit of parenthood to parents of a defective infant.[31]

In a similar case, *Gildiner v. Thomas Jefferson University Hospital*,[32] the United States District Court recognized a cause of action for "wrongful life" brought by parents of a genetically defective child.[33] The action arose from the negligent performance of an amniocentesis test to determine whether a fetus was afflicted with Tay-Sachs disease.[34] Plaintiffs were incorrectly advised that the fetus was not afflicted with the disease, allegedly resulting in the decision not to terminate the pregnancy.[35] The court held that the physician's negligence was the proximate cause of the plaintiffs' injuries as a result of the denial of the opportunity to abort, and allowed damages for the child's medical expenses. Defendant's contention that recognition of a cause of action for "wrongful life" was contrary to public policy was rejected.[37] The court found that society had a vital interest in insuring that genetic testing was accurately performed.[38] Failure to properly perform an

25. 519 S.W.2d 846 (Tex. 1975).
26. Jacobs v. Theimer, 519 S.W.2d 846, 847-48 (Tex. 1975).
27. *Id.* at 848.
28. *Id.*
29. *Id.*
30. *Id.* at 850.
31. *Id.* at 849.
32. 451 F. Supp. 692 (E.D. Pa. 1978).
33. Gildiner v. Thomas Jefferson Univ. Hosp., 451 F. Supp. 692, 695-96 (E.D. Pa. 1978).
34. *Id.* at 694. Tay-Sachs disease, also known as amaurotic familial idiocy, is a hereditary genetic disease affecting children and is characterized by partial or complete loss of vision, mental underdevelopment, softness of muscles and convulsions. SCHMIDT'S ATTORNEY'S DICTIONARY OF MEDICINE A-126 (1978).
35. 451 F. Supp. at 694.
36. *Id.* at 694-95.
37. *Id.* at 696.
38. *Id.*

amniocentesis test could result in the abortion of a healthy fetus, as well as the unwanted birth of an afflicted infant.[39] Judicial recognition of a cause of action for negligence in the performance of genetic testing was founded in part upon the policy of encouraging the accurate performance of such testing by penalizing physicians who failed to exercise due care.[40] Unlike *Jacobs*,[41] the court in *Gildiner* did not indicate that damages would be limited to medical expenses and reserved that issue for trial.[42]

The New Jersey Supreme Court,[43] in a case factually identical to *Becker*, has also recognized a cause of action by parents of abnormal children alleging "wrongful life" as cognizable at law.[44] In this action the court held that damages for emotional injury, if proven, were allowable, but specifically disallowed damages for medical and other expenses that would be incurred in raising and educating the child.[45] In denying recovery for expenses to be incurred in raising the child, the court found that such an award would constitute a windfall to the parents and would be disproportionate to the culpability of the defendant.[46] The court allowed compensation for emotional harm on the theory that it more accurately represented the proper damages for the deprivation of the parents' option to accept or reject a parental relationship with a potentially defective child.[47]

Prior to the *Becker* decision, the New York Court of Appeals had consistently held that complaints, filed by parents of abnormal children either on their own behalf or that of their infant alleging "wrongful life," were not cognizable at law.[48] *Becker* followed the majority rule by rejecting, as not legally cognizable, actions by infants alleging that their very life was wrongful and seeking damages on that basis.[49] The court rejected the infant plaintiff's action on the grounds that he had suffered no legally cognizable injury.[50] In finding no cognizable injury the court refused to recognize "the fundamental right of a child to be born as a whole,

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39. *Id.*
40. *Id.*
41. Jacobs v. Theimer, 519 S.W.2d at 850.
42. 451 F. Supp. at 696.
43. Berman v. Allen, 80 N.J. 421, 404 A.2d 8 (1979).
44. *Id.* at ____, 404 A.2d at 14.
45. *Id.*
46. *Id.*
47. *Id.*
48. Stewart v. Long Island College Hosp., 30 N.Y.2d 695, 283 N.E.2d 616, 332 N.Y.S.2d 640 (1972). This memorandum opinion rejected the cause of action on the same grounds as the New Jersey court in *Gleitman*. *Id.* at ____, 283 N.E. 2d at 616, 332 N.Y.S.2d at 640-41.
49. Becker v. Schwartz, 46 N.Y.2d at ____, 386 N.E.2d at 811, 413 N.Y.S.2d at 900.
50. *Id.* at ____, 386 N.E.2d at 812, 413 N.Y.S.2d at 900.

functional human being."[51] Whether it was better not to be born than to be born with serious defects was an issue the court asserted no competence to resolve.[52] In addition, the court felt that such an action demanded a calculation of damages based upon a comparison of life in an impaired state and non-existence, a comparison the law was not equipped to make.[53]

In accepting as cognizable a cause of action by parents alleging "wrongful life," the *Becker* court accepted the majority position and in doing so overruled what had been the rule in New York.[54] The court found the plaintiffs had properly alleged the existence of a duty between themselves and the defendant physicians.[55] Further, the breach of this duty caused ascertainable damages which included the pecuniary expenses resulting from the care and treatment of the infant.[56] The *Becker* court specifically rejected the plaintiffs' claim that damages for emotional or psychic injury, allegedly due to the birth of an impaired infant, were within the scope of allowable compensation.[57] The court refused to sanction the recovery of these damages because of their speculative nature.[58] In the opinion of the court, it would not be possible to assess the emotional injury because of an inability to make the complex comparison between the damages caused by defendants' negligence and the benefit of parenthood conferred on the plaintiffs.[59]

In *Becker*, the New York Court of Appeals was forced to make a ruling in an area of great controversy. While the fundamental reason for rejecting the infant's cause of action[60] may be legally

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51. *Id.*

52. *Id.*

53. *Id. But see* Story Parchment Co. v. Paterson Parchment Co., 282 U.S. 555 (1931). The Court in *Paterson* stated as follows:

> Where the tort is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amends for his acts.

Id. at 563.

54. *See* Stewart v. Long Island College Hosp., 30 N.Y.2d 695, ____, 283 N.E.2d 616, 332 N.Y.S.2d 640, 641 (1972).

55. 46 N.Y.2d at ____, 386 N.E.2d at 813, 413 N.Y.S.2d at 901.

56. *Id.* In *Becker*, the court refused to further delineate the nature or limits of damages that might be allowable, as the action was limited to addressing the legal sufficiency of the complaints themselves. *Id.*

57. *Id. Accord*, Howard v. Lecher, 42 N.Y.2d 109, 366 N.E.2d 64, 397 N.Y.S.2d 363 (1977).

58. 46 N.Y.2d at ____, 386 N.E.2d at 813-14, 413 N.Y.S.2d at 901-02.

59. *Id.* The dissent in *Becker* contended that the parents' suit for "wrongful life" should also be dismissed on grounds that the defendants' negligence was not the proximate cause of the injuries, that the parents' cause of action was derivative of the infant's cause of action and that the infant had suffered no legally cognizable injury. 46 N.Y.2d at ____, 386 N.E.2d at 816-18, 413 N.Y.S.2d at 904-06 (Wachtler & Gabrielli, JJ., dissenting in part).

60. The court rejected the infant's cause of action primarily on grounds that the infant did not suffer any legally cognizable injury. 46 N.Y.2d at ____, 386 N.E.2d at 812, 413 N.Y.S.2d at 900.

sound, the alternative ground, that damages are unascertainable, seems less than convincing in light of fundamental justice and existing precedent.[61] Additionally, the court notes its inability to properly address the required comparisons and provide some compensation to the infant.[62] A solution to this hurdle might be found in the "Special Benefit" rule,[63] which has been used to calculate damages in an analogous situation in "wrongful conception" actions. Applying this rule, the defendant would be required to compensate the infant for the impairments the child must suffer as a result of the defendant's negligence which prevented the termination of the pregnancy. The defendant would be able to offset the portion of those damages equal to the value of the benefit he conferred on the plaintiff through his negligence, that of influencing the parents to give life to the fetus.[64]

The chief importance of *Becker*, however, is the recognition of a cause of action by parents of abnormal infants alleging "wrongful life."[65] Through this decision, the court brought a large and influential jurisdiction in line with the majority position.[66] In a more fundamental sense, it has provided a legal recourse to parents of abnormal infants.

Since no case alleging "wrongful life" has been decided in North Dakota, it is difficult to evaluate the effect of this decision on North Dakota law. Should an action for "wrongful life" be brought by an infant, the court would be obliged to follow the uniform rule[67] and reject their complaints or accept them on the basis of an innovative approach, such as the adoption of the "Special Benefit" rule.[68] Implicit in any new approach allowing

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61. 282 U.S. 555 (1931). *See supra* note 53 for the concept of fundamental justice as applied to allegedly unascertainable damages.

62. 46 N.Y.2d at ____, 386 N.E.2d at 812, 413 N.Y.S.2d at 900.

63. The "Special Benefit" rule states as follows:

> When the defendant's tortious conduct has caused harm to the plaintiff or to his property and in doing so has conferred a special benefit to the interest of the plaintiff that was harmed, the value of the benefit conferred is considered in mitigation of damages, to the extent that this is equitable.

RESTATEMENT (SECOND) OF TORTS § 920 (1977).

For applications of section 920, involving the calculation of damages for the economic costs of raising a child in wrongful conception cases, *see generally*, Anonymous v. Hospital, 33 Conn. Supp. 126, 366 A.2d 204 (1976); Sherlock v. Stillwater Clinic, ____ Minn. ____, 260 N.W.2d 169 (1977).

64. In the present case, the plaintiff would be compensated for past and future pain and suffering and those pecuniary expenses that would continue beyond maturity. This amount would, however, be reduced by an amount equivalent to the value of the benefit conferred on the infant through the defendants' negligence, that of an impaired life. RESTATEMENT (SECOND) OF TORTS § 920 (1977).

65. Becker v. Schwartz, 46 N.Y.2d at ____, 386 N.E.2d at 813, 413 N.Y.S.2d at 901.

66. *See* cases cited *supra* note 23 for jurisdictions in the majority.

67. *See supra* note 10 for cases which follow the uniform rule.

68. RESTATEMENT (SECOND) OF TORTS § 920 (1977).

recognition must be standards to determine the degree and nature of defects that would sustain a cognizable injury. Also difficult to assess would be the result of an action brought by parents of a child born with defects. Recognition of the action would bring North Dakota in line with a growing majority of jurisdictions which have considered the issue.[69] Further, recognition would encourage the accurate performance and interpretation of genetic testing by allowing actions against physicians who fail to follow acceptable medical standards.[70] Should a cause of action by parents for "wrongful life" be recognized, the question of allowable damages would require the court to choose between competing policy considerations. Recovery for all pecuniary expenses reasonably necessary for raising and educating the child may be viewed as disproportionate to the physician's culpability and constitute a windfall to the parents.[71] Conversely, denial of all recovery for pecuniary expenses could tend to discourage physicians from exercising the utmost care in genetic testing.[72] A compromise solution might be to allow for recovery based on the additional expenses to be incurred in raising an afflicted child as contrasted with the cost of raising a normal, healthy infant. The question of allowing damages for emotional harm is perhaps the most difficult to assess and has produced the most pronounced recent split of authority in other jurisdictions.[73] However, should the court find that there was a duty owed directly from the physician to the parents, it would seem inconsistent to deny recovery for emotional harm as a component of damages unless it is determined that such damages are too speculative in nature.[74]

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69. *See* cases cited *supra* note 23 for jurisdictions in the growing majority.

70. Gildiner v. Thomas Jefferson Univ. Hosp., 451 F. Supp. at 696.

71. Berman v. Allen, 80 N.J. at ____, 404 A.2d at 14.

72. 451 F. Supp. at 696.

73. Becker v. Schwartz, 46 N.Y.2d at ____, 386 N.E.2d at 813, 413 N.Y.S.2d at 901-02 (disallowing damages for psychic or emotional harm); Berman v. Allen, 80 N.J. at ____, 404 A.2d at 14 (allowing damages only for emotional harm).

74. 46 N.Y.2d at ____, 386 N.E.2d at 818, 413 N.Y.S.2d at 906 (Wachtler & Gabrielli, JJ., dissenting in part). The dissent in *Becker* contends that once it is determined that the physician did breach a duty directly owed to the parents, there is no longer any basis for denying recovery for emotional injury as well as pecuniary loss. The dissent implies that the majority has confused the issue of whether a separate duty was owed by the physician to refrain from unintended emotional harm with the issue of whether that harm is a proven component of the damages once the existence of a duty has been established. According to this view, the proper question is whether the plaintiffs suffered compensable emotional harm from the breach of any duty which was directly owed to them by the defendant. *Id.*